

CLEARY GOTTLIEB STEEN & HAMILTON LLP

2000 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006-1801
(202) 974-1500
FACSIMILE
(202) 974-1999
WWW.CLEARYGOTTLIEB.COM

NEW YORK
PARIS
BRUSSELS
LONDON
FRANKFURT
COLOGNE
MOSCOW

MARK LEDDY	NOVELL BAMBERGER	CARL L. MALL
GEORGE S. CARY	ELSEBETH BENNETT	FARRELL MALONE
MICHELLE S. DUPLER	GRANT A. BERMAN*	MATTHEW A. MC GUIRE
GIOVANNI P. PREZIOSO	KEVIN BIRNEY*	ROBERT A. MCNAMEE
MICHAEL H. KRIMMINGER	JACOB BOYARS	BENJAMIN MEeks
MATTHEW D. SLATER	NATHAN S. BROWNBACK*	DAN MIFFLIN
MICHAEL A. MAZUCHI	STEVEN S. CHURCH*	KAREN MILLIGAN
ROBERT W. COOK	ETHEL CRAIG	MORGAN A. MULVENON
MARK W. NELSON	SARAH CRANDALL	CHRISTINE MUNDIA
ROBIN M. BERGEN	DANIEL CULLEY	TANYA TAUBMAN O'NEIL
DEREK M. BUSH	REGINALD CUYLER JR.*	SAMUEL PARK*
BRANDON J. CANN	MATTHEW D. FAIGLER	JENNIFER A. PAUL
PAUL D. MARQUARDT	LISA A. DANZIG	DANIEL PEREZ
JEREMY CALSYN	RYAN M. DAVIS	AMBER V. PHILLIPS*
LEAH BRANNON	JOANNA MARIA EL KHOURY*	KENNETH S. REINKER
KATHERINE MOONEY CARROLL	TABITHA EDGERS*	HAKEEM RIZK
PAUL R. ST. LAWRENCE	EDWARD EWING	GREGORY T. W. ROSENBERG
RESIDENT PARTNERS	BRANDON C. FIGG*	ANDREW S. STASS*
	ERIN FRAKE	ALYSSA C. SCRUGGS
KENNETH L. BACHMAN, JR.	PATRICK FULLER	OMAR SERAGELDIN
DANIEL B. SILVER	JOSHUA B. GARDNER*	SAFI SHAH MOHAMMED
RICHARD DEC. HINDS	MICHAEL D. GENDALL*	ZACK SCHAFFNER
SARA D. SCHOTLAND	MELISSA A. GOLDE	LAUREN E. SNYDER
WILLIAM B. SCOTT III	JEFFREY AARON HALL	CAROLINE STANTON
JOHN P. MAGUIRE	CARRIE ELIZABETH HANSON	CHARLES STERLING
JANET L. WELLER	EILEEN HO*	RYAN SUGG*
LINDA J. SOLDO	JAMES HUNSPERGER	TARA L. VAN TAVERNIA
SENIOR COUNSEL	PHILIP A. HURST*	TEAL TOWELL
	BRADLEY JUSTUS	KELLY ERIN WADE*
W. RICHARD BIDSTRUP	ANNA KARASS	ASHLEY WALKER
STEPHEN KAISER	THOMAS KELLY	ERIK WITTMAN
JOYCE E. MCCARTY	ANDREW L. KLINE	ASSOCIATES
KATHLEEN W. BRADISH	ZUZANNA KNYPINSKI	
COUNSEL	ALICE K. KIM	
KAREN A. KERR	ALEXIS R. LAZDA*	
JOHN M. MCGILL, JR.	JOANNA R. LAMPE	
THOMAS J. HALL	CHINYELU K. LEE	
LARRY WORRE DEMBOWSKI	MEREDITH LEIGH MANN	
MEGHAN A. IRMLER	BENJAMIN A. MINTON	
SENIOR ATTORNEYS	KATHARINE A. LEVINE	
	MACEY LEVINGTON	
	JENNIFER X. LUO	

* ADMITTED ONLY TO A BAR OTHER THAN THAT OF THE DISTRICT OF COLUMBIA.
WORKING UNDER THE SUPERVISION OF PRINCIPALS OF THE WASHINGTON OFFICE.

Writer's Direct Dial: +1 (202) 974-1920
E-Mail: gcarly@cgsh.com

July 8, 2015

VIA ECF

Hon. Vernon S. Broderick, U.S.D.J.
Thurgood Marshall United States Courthouse
40 Foley Square, Room 415
New York, NY 10007

Re: *In re: Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, MDL No. 2542;
Response to Notices of Supplemental Authority filed by IPPs and TreeHouse

Dear Judge Broderick:

We write regarding the Notices of Supplemental Authority submitted by Indirect Purchaser Plaintiffs (“IPPs”) and Plaintiff TreeHouse Foods, Inc. (TreeHouse), ECF Nos. 282, 284, just three days before oral argument on Keurig’s Motions to Dismiss.

The case identified by IPPs, *McWane, Inc. v. F.T.C.*, 783 F.3d 814 (11th Cir. 2015), was decided nearly three months ago. IPPs argue that the decision is notable because the court rejected one of McWane’s arguments regarding monopoly power. But this is irrelevant here, where Keurig lacks monopoly power in brewers in light of the allegations that it *prices brewers at or below cost in order to compete*, and where plaintiffs have not made allegations sufficient to meet the test for monopoly power in a purported aftermarket. Keurig Mem. of Law ISO Mot. to Dismiss, ECF No. 231, at 18, 20-21. *McWane*, in contrast, did not involve an aftermarket product or allegations of at or below cost pricing.

As for TreeHouse’s 1,300 word letter, it introduces new arguments based on cases decided before its brief was filed, and is an unauthorized sur-reply filed on the eve of argument. See Individual Rule 4.B (“Sur-reply memoranda will not be accepted without prior permission of the Court.”). TreeHouse’s letter also identifies no new relevant law.

Hon. Vernon S. Broderick

Page 2 of 2

In *U.S. v. Apple, Inc.*, --- F.3d ----, 2015 WL 3953243 (2d Cir. 2015), the Second Circuit noted the well-established rule that a hub-and-spoke conspiracy requires agreements among the spokes. *Id.* at *17. The Second Circuit affirmed the finding of agreements in light of, *inter alia*, “near-simultaneous signing” of the agreements at issue and “constant communication” among the publisher spokes. *Id.* at *21. As noted in our reply brief discussing these same points in the district court’s opinion, neither circumstance is alleged here. Keurig Reply Mem. of Law ISO Mot. to Dismiss, ECF No. 264, at 8. There is no plausible allegation of communication between, for example, Emeril’s and Cinnabon, and the trademark licensing agreements at issue here are alleged to have been signed over the span of *nearly a decade*. *Id.*

Kimble v. Marvel Entertainment, --- S. Ct. ----, 2015 WL 2473380 (June 22, 2015), also establishes no new law. “The sole question presented” in *Kimble* was whether to overrule *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), which the Supreme Court declined to do. *Kimble*, 2015 WL 2473380 at *3. Nor is the *Brulotte* patent licensing rule relevant here in any event, as evidenced by (among other things) the fact that TreeHouse’s prior briefing did not cite it and there are no allegations of unlawful patent licensing in the TreeHouse complaint.

TreeHouse’s final case, *People of the State of New York v. Actavis plc*, No. 14-4624, 2015 WL 3405461 (2d Cir. May 22, 2015), was decided six weeks ago, was already brought to this Court’s attention (ECF No. 276), and reiterates that the key issue in an antitrust challenge to product design is whether the defendant has coerced consumers, which Keurig has not done. Indeed, plaintiffs affirmatively allege that Keurig’s portion packs continue to be compatible with 1.0 brewers, such that no consumer is forced to buy a new brewer. *Actavis*, 2015 WL 3405461, at *9 (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979)).

TreeHouse also uses *Actavis* as a springboard to discuss *In re Suboxone Antitrust Litigation*, 64 F. Supp. 2d 665 (E.D. Pa. 2014), a 2014 case nowhere in the record, and to offer freestanding discussion of *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), both already cited in its briefing. These new arguments do not show the coercion required to sustain a product design claim under *Berkey* and *Actavis*. *In re Suboxone* involved a forced switch like the Second Circuit found unlawful in *Actavis* and that is not present here. 64 F. Supp. 2d. at 681. And TreeHouse now cites *Microsoft* in an unavailing attempt to use faulty exclusive dealing allegations to shore up a faulty product design claim. But there is no basis for arguing that Keurig’s contracts with distributors (who are never alleged to carry even a single 2.0 brewer) show that the 2.0’s *design* coerces consumers. Finally, the *Berkey Photo* language regarding intent that TreeHouse now cites addressed Kodak’s restriction of its new *film* to its new camera. See *Berkey Photo*, 603 F.2d at 288. Here, Keurig’s portion packs are backwards compatible with 1.0 brewers manufactured by Keurig and others, and therefore cannot constitute “coercion.”

Respectfully submitted,

/s/ George S. Cary

George S. Cary

cc: Counsel of record (via ECF)